SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 47

SAM GINSBERG,

Appellant,

—v.—

THE STATE OF NEW YORK,

Appellee.

No. 64

UNITED ARTISTS CORPORATION,

Appellant,

—v.—

CITY OF DALLAS,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

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MOTION OF AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF, AMICI CURIAE

The American Civil Liberties Union, and its New York and Texas affiliates, move for leave to file a brief amici curiae in the two within cases. Attorneys for the parties in both cases, with the exception of the City of Dallas, have granted consent.

The American Civil Liberties Union is opposed to censorship in general, to film classification in particular as in No. 64, and to variable censorship standards depending on the age of the audience.

The statutes involved in the cases at bar are forms of prior censorship and thus violate the First Amendment. Although certain films and publications are thought by some members of the community to be unsuitable for children, it is up to parents, not governmental agencies, to decide what their children should see or read. Individual parents may heed the advice of various experts in determining what is good for their children, but they must be in the end be left free to accept or reject such advice as they see fit. The divergent views of parents on this subject are so numerous that it would be impossible for any official authority to formulate a consistently wise policy that could be applied to all children.

The practical effect of censorship for children is to lead producers and publishers to avoid censorable or controversial subjects designed for a wide audience, for many subjects—divorce, adultery, the intermixing of races—have been the target of censorship at some time. Thus free expression of opinion is inevitably discouraged.

The American Civil Liberties Union believes that its views on the constitutional problems involved in these cases will be of assistance to the Court and moves for leave to file the attached brief.

Respectfully submitted,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND TEXAS CIVIL LIBERTIES UNION, AMICI CURIAE

Interest of Amici

The interest of amici is set forth in the Motion for Leave to File this brief, *supra.*

Questions Presented

Whether Dallas City Ordinance No. 11,284 and Section 484-h of the New York Penal Law, which prohibit the exhibition of films and sale of books to minor children which are deemed, respectively, "not suitable for young persons" or "harmful to minors," violate the First and Fourteenth Amendments to the United States Constitution.*

ARGUMENT

I.

The statutes violate the First and Fourteenth Amendments because they are unconstitutional restrictions on freedom of speech.

Both statutes would be unarguably unconstitutional as a denial of First Amendment rights of both distributor and viewer were it not for the fact that they purport only to restrain dissemination of material to children. *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966) and *Butler* v. *Michigan,* 352 U. S. 380 (1957) clearly hold that protected materials may be withheld from the entire community because of their sexual content only if they are "utterly without redeeming social value," and may not be banned merely because they might offend young readers, listeners or viewers. These well-established principles are said not to apply under the statutes at bar, however, because they prohibit only distribution to minors.

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* The statutes are set out in full in the Appendix, *infra.*

The only justifications that might seriously be advanced for these statutes are (a) that children are not entitled to exercise substantial First Amendment freedoms or (b) that an overriding state interest justifies invading the publisher's right to speak and the child's right to hear. Neither justification withstands analysis.

This Court has not dealt at length with the extent to which the Constitution protects the right of minors to speak freely and to hear what they wish. In other areas, however, the Court has made it clear that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U. S. 1 (1967). *Gault* makes it crystal clear that the state may not, under the guise of according special protections aimed solely at minors, deny them the full protections of the Fifth and Sixth Amendments. And the power of the state to provide for and direct the education of children does not permit invasion of their right to enjoy the free exercise of religion or allow the imposition of religion. *School District* v. *Schempp,* 374 U. S. 203 (1963); *Engel* v. *Vitale,* 370 U. S. 421 (1962). Nor may the state force minors to utter words which offend their religious principles. *West Virginia Bd. of Education* v. *Barnette,* 319 U. S. 624 (1943).

It would indeed be inconsistent were minors to enjoy these freedoms but at the same time lose the right to think, speak, read and listen free of imposition of governmental censorship. In fact, this Court has already taken a much broader view. In dealing with the rights of children to resist the force-feeding of patriotic rituals, the Court has said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political con-

> troversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly . . . may not be submitted to vote; they depend on the outcome of no elections. *Barnette, supra,* at 638.

There is another more restrictive view of the First Amendment that could be proposed to justify broader censorship of material aimed at children than that disseminated in the adult community. Arguably, the purpose of permitting free expression is to allow society to make a rational choice among competing points of view; and it can plausibly be maintained that only adults should be allowed to do the choosing. This theory assumes that the average citizen is qualified to sort out and evaluate the ideas presented to him, but it does not assume that he can do so whatever his age. It assumes that a child cannot sort and evaluate, but will accept uncritically what he reads and hears.

> "This theory of the First Amendment is too narrow. It overlooks the obvious: that today's children are tomorrow's adults. Because a child will accept uncritically what he hears, he is to hear nothing but what the majority wants him to hear. Having heard, and by hypothesis accepted, nothing but orthodoxy all his life, he is suddenly to be transformed into a rational adult who will choose impartially in the marketplace of ideas. Surely this is too much to expect. Surely if we let any orthodoxy monopolize the minds of our children, we risk letting it control the future of our

society. The First Amendment, then, if its purpose is to preserve authentic competition among opinions, must protect expression to children as well as adults." Comment, 67 Colum. L. Rev. 1149, 1158 (1967) (footnotes omitted).

Thus, the First Amendment requires that children not be excluded from the full range of material which that Amendment is designed to protect. They too must have the freedom to enter the marketplace of political and cultural ideas. Material of redeeming social value cannot be withheld from minors without undermining the purposes of the First Amendment. The presence or absence of candid sexual portrayals may not be made the sole criterion of censorship, regardless of the age of the audience being sheltered. "The right of young persons to read what they will . . . is vital not only to them but to all our citizenry." *Police Comm'r* v. *Siegel Enterprises, Inc.*, 162 A. 2d 727, 731 (Md. 1960). In short, the First Amendment forbids the concept of variable obscenity incorporated in the statutes at bar. *Paramount Film Distrib. Corp.* v. *City of Chicago*, 172 F. Supp. 69 (N. D. Ill. 1959).

No valid state interest in the preservation of child welfare is at stake here which would justify overriding these substantial First Amendment goals. *Gault, Engel, Schempp* and *Barnette* all reject the notion that the governmental interest in child welfare is so overpowering, that First Amendment rights may be relaxed whenever a state sees fit to do so. *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), lends no support to these statutes. That case extends no further than its specific facts. See *Prince* at 171. Moreover, the Court there was especially cognizant

of the dangers to young persons from "the crippling effects of child employment . . . and the possible harms arising from other activities subject to the diverse influences of the street." *Prince* at 168. It was the presence of this tangible and demonstrable evil that led the Court to justify governmental tampering with a tangential exercise of religious freedom, and the sweeping dicta concerning the state's power to protect child welfare *in loco parentis* must be read in the light of the historic dangers of child labor as well as later re-assessment of those dicta implicit in *Schempp* and *Gault*.

Here, the State of New York and the City of Dallas assert no tangible reason for these broad limitations on First Amendment freedoms. The Dallas ordinance itself suggests that its purpose is to prevent anti-social behavior, but there is no reputable evidence that candid sexual portrayals influence viewers to commit crimes.* In fact, the available evidence is to the contrary. A major conclusion of the careful study, Sex Offenders, published by the Kinsey Institute in 1965, is that so-called pornographic mate-

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* A series of monographs on children and the movies, published by the Payne Fund in 1933, include some studies purporting to prove that movies have a substantial influence on child behavior. Dr. Mortimer Adler has said these pamphlets exemplify "the worst . . . kind of work that is done today in psychology and the social sciences." Quoted in Moley, Are We Movie Mad? at 16 (1938). Adler was careful to point out that two or three of the studies were carried out fairly. These invariably failed to correlate movie attendance with anti-social action. Moley at 36-40. Adler's extensive critique of the Payne Fund work may be found in Adler, Art and Prudence (1937). The same conclusion is reflected in a recent federal statute, Pub. L. No. 90-100 (October 3, 1967), creating a Commission on Obscenity and Pornography. Section 5(a)(3) states that one of the major purposes of the Commission is "to study the effect of obscenity and pornography upon the public, and particularly minors, and its relationship to crime and other anti-social behavior."

rials are not a factor in the causation of sex offenses. Discussing the work of the country's foremost experts on juvenile delinquency, Sheldon and Eleanor Glueck, one commentator has observed that they

> "... have consistently traced anti-social behavior traits to the individual's physical constitution and home environment, rather than movies and books. '[O]ne does not get at the basic problems presented by the energetic, adventure-thirsty mesomorphic lad by taking movies or comics away from him. If he has a need for such outlets he will somehow get to them; and *deprivation is no cure.*' It appears that anti-social traits are developed at an extremely early age, before the child is capable of intelligent comprehension of films. In developing yardsticks for predicting juvenile delinquency, no reliance is placed on the individual's entertainment material." Comment, 67 Colum. L. Rev. 1149, 1154-55 (1967) (footnotes omitted). See also Id. at note 47.*

Neither statute contains any suggestion that its impact is limited to those authors who attempt to exploit curiosity in sex for commercial gain. In fact, the facts underlying each of these cases thoroughly disprove that notion. Nor, in the face of *Engel, Schempp,* and *Barnette,* can it be main-

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* Other authors have reached the same conclusion. See *Roth* v. *United States,* 237 F. 2d 786, 802 (2d Cir. 1956) (dissenting opinion Frank, J.), aff'd 354 U. S. 476 (1957); Murphy, The Value of Pornography, 10 Wayne L. Rev. 655 (1964); Cairns, Paul & Wishner, Sex Censorship: The Assumptions of the Anti-Obscenity Law and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); Green, Obscenity, Censorship and Juvenile Delinquency, 14 U. Toronto L. J. 229, 234 (1962); Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963).

tained that the state's powers of education are sufficient to justify these measures.

In sum, one cannot say what evil it is that Dallas and New York are attempting to control with such legislation, other than penalizing speech which is thought to be immoral or the medium of impure ideas—an objective that is clearly impermissible. See *Kingsley Pictures* v. *Board of Regents*, 360 U. S. 684 (1959).

Proponents of the statutes at bar are unable to produce a tenable constitutional principle that would validate age classification censorship on the basis of sex content and which at the same time would save from constitutional invalidity censorship designed to prevent children from seeing, reading or hearing materials governmental officials deem offensive. There is no principled distinction between these forms of censorship and the variable obscenity concept. Analytically, each has an equal claim to validity under the Constitution. The First Amendment demands that each be declared invalid.

II.

The statutes are unconstitutionally vague.

The void-for-vagueness doctrine requires that statutes be sufficiently specific so that a person may reasonably predict whether his intended behavior will bring him within the restrictions and sanctions imposed by the law. Stricter vagueness criteria are applicable to statutes infringing on freedom of speech, *Smith* v. *California*, 361 U. S. 147, 150-52 (1959), because considerations beyond the individual interest in fair notice are present. Moreover, "the fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts." *Times Film*

Corp. v. *City of Chicago,* 365 U. S. 43, 75 (1961) (dissenting opinion of Warren, Ch.J.).

Censorship standards classified by this Court as too vague include "sacrilegious", *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952); "of such character as to be prejudicial to the best interests of the people", *Gelling* v. *Texas,* 343 U. S. 960 (1952); "on account of being harmful", *Superior Films, Inc.* v. *Department of Education,* 346 U. S. 587 (1954); "immoral" and tending "to corrupt morals", *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587 (1954); and "obscene, indecent, immoral, inhuman, sacrilegious," or "would tend to corrupt morals," *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684 (1959).

In the light of past decisions, the Dallas statute is hopelessly vague. Its terms are at least as devoid of meaning as those set forth above. By making the legality of speech depend upon the whimsical opinion of a board of citizens, the Dallas statute sets the censors "adrift upon a boundless sea amid a myriad of conflicting . . . views, with no charts" to guide them. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 504-05 (1952). Censorship based on the belief that material is "likely to incite or encourage delinquency" clearly runs afoul of the doctrine of *Winters* v. *New York,* 333 U. S. 507 (1948), which held unconstitutionally vague a book censorship statute forbidding "the massing of stories of . . . lust in such a way as to incite crime against the person." Id. at 514. In fact, "the judgment of the Board" relied upon by the Dallas statute is more than vague; it is nonexistent. No judgment is rendered until the publisher has already acted. How is he to conform his behavior to the future whims of persons unknown to him? What does it mean to advise a film producer that his work will be banned on the theory that it is likely to encourage

sexual promiscuity if a local censorship board feels there is a "substantial probability" that it will give young persons the "impression" that "sexual promiscuity" is "profitable" or "desirable"? By what standards does a court review a determination that "in the judgment of the Board" the "dominant effect" of a film is "substantially" to "arouse sexual desire"?

The unintelligible vagueness of the New York statute has been conceded by a proponent of age classification censorship. He notes that the statute contains "all the words that hardly any two judges seemed to have been able to interpret alike, . . . peppered liberally with the words 'for minors' ": R. Kuh, Foolish Figleaves? 251 (1967). How is the average bookseller to discover the "prevailing standards in the adult community . . . with respect to what is suitable material for minors" or what constitutes "redeeming social importance for minors"?

Furthermore, failing to delineate in precise terms what booksellers and film producers may or may not do will discourage those who are cautious or unable to afford litigation from selling materials to minors that the law was not in fact intended to proscribe. These statutes will inevitably result in a broader scope of actual censorship than any court would wish to permit.

Validation of these statutes will also result in more than excessive self-censorship. Official censorship itself, when limited by terms as imprecise as these, is certain to exceed the limits intended by any court or legislature cognizant of the First Amendment values at stake here. One commentator has concluded, after a thorough survey of eight motion picture censorship boards, that "[t]he basic problem with motion picture censorship is that wherever

it is put into practice it flouts the supreme law of the land day after day and year after year." Carmen, Movies, Censorship and the Law 244 (1966). "Granting further latitude to the censors is certain to multiply the horrors already perpetrated by those institutions of official dogma. We do not know what [materials] may be suppressed in the name of child welfare—but the works of Hemingway, Salinger, Moravia, Maugham, Dumas, Voltaire, de Maupassant, Tolstoy, Zola and Freud have been officially deemed unfit for adults in the past." Comment, Exclusion of Children From Violent Movies, 67 Colum. L. Rev. 1149, 1168 (1967) (footnotes omitted). See also Id. at 1167, n. 107; Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 890 (1963).

The dangers inherent in the administration of vague censorship statutes are fully present in both cases under consideration here. In Dallas, an official board performs the censorship function; in New York, it is the police. Nor is the Dallas statute saved by the provision for judicial review. The judge applies the same standards utilized by the Board* and the producer and distributor can avoid criminal sanctions only by suffering censorship. Surely the right of persons to be free from penalties imposed by vague criminal censorship statutes cannot vary with the audience sought to be restricted; it is their rights, not those

* The fact that "the judgment of the Board" is an indispensable prerequisite to a finding, under the Dallas ordinance, that a film is censorable inevitably leads to the conclusion that the statute fails to meet the standards of *Freedman v. Maryland*, 380 U. S. 51 (1965). That case requires de novo judicial review of all acts of any film censorship board. The standards of the Dallas ordinance reduce the judge's function to determining whether the Board's adjudication was an abuse of discretion. No court can make a de novo finding of whether or not a film is, *in the judgment of the Board*, likely to incite young persons to anti-social behavior.

of their audience, that the void-for-vagueness doctrine is intended to protect.

Where First Amendment rights are being infringed, one will not be heard to argue that it is better to cope with the difficulties and irrationalities of administration than to have no law at all.

CONCLUSION

For the reasons stated above, the convictions should be reversed.

Respectfully submitted,

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